Office - Supreme Court, U.S.
FILED
OCT 8 1982
ALEXANDER L. STEVAS,
CLERK

82-634
No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, '982

WILLIAM CURTIS, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD M. MOSER,
BURTON A. ROSE,
Counsel for Petitioner,

PERUTO, RYAN & VITULLO,
Washington West Building,
N.E.C. Eighth & Locust Streets,
Philadelphia, Pennsylvania 19106
(215) 925-5800

Pennsylvania Appellate Printing Co.—(215) 545-1707

QUESTION PRESENTED

1. Does appellate reversal of a conviction because of intentional prosecutorial misconduct, found by the District Court to have been designed to invoke a mistrial request, work a bar to reprosecution by reason of the double jeopardy clause?

TABLE OF CONTENTS

Question Presented i

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit 1

Jurisdiction 1

Constitutional Provisions Involved 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT:

This Court should direct that the decision of the United States District Court in this matter be reinstated to the extent that that Court ordered that the Government would be barred from re-prosecuting your Petitioner because of the intentional prosecutorial misconduct which occurred at his first trial and which caused the United States Court of Appeals for the Third Circuit to initially reverse the judgment of conviction and sentence. 7

Conclusion 13

Certificate of Service 14

Appendix A A1

CASES CITED:

Burks v. United States, 437 U.S. 1 (1978) 7, 8

Commonwealth v. Potter, 386 A.2d. 918 (Pa. 1978) 11

Dinitz v. United States, 424 U.S. 600 (1976) 8, 10

TABLE OF CONTENTS

CASES CITED:

Doyle v. Ohio,
426 U.S. 610 (1976) 4

Florida v. Tiggs,
50 U.S.L.W. 4607 (1982) 7

Gori v. United States,
367 U.S. 364 (1961) 8

Krasnov v. Dinan,
465 F.2d. 1298, 1302 (3d Cir. 1972) 8

Oregon v. Kennedy,
31 Cr.L.R. 3044 Footnote 7 ..... 8, 11

Roemer v. Maryland Public Works Board,
426 U.S. 736, 758 (1975) 8

United States v. Curtis,
644 F.2d. 263 (3d Cir. 1981) 2

United States v. Hale,
422 U.S. 171 (1975) 4

United States v. Heymann,
586 F.2d. 1039 (5th Cir. 1978) 11

United States v. Opager,
616 F.2d. 231 (5th Cir. 1980) 11

United States v. Rios,
637 F.2d. 728 (10th Cir. 1980) 11

United States v. Roberts,
640 F.2d. 225 (9th Cir. 1981) 11

SUPREME COURT OF THE UNITED STATES

FOR THE THIRD CIRCUIT

WILLIAM CURTIS, III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

William Curtis, III, the Petitioner above named, respectfully prays that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit entered in this case on July 13, 1982, as confirmed by the denial of a Motion for Rehearing en banc (filed July 27, 1982) on August 9, 1982.

The Opinion of the United States Court of Appeals for the Third Circuit is attached hereto as Appendix A.

JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit was entered on July 13, 1982. On

September 13, 1982, the United States Court of Appeals for the Third Circuit entered an Order staying the issuance of the certified judgment in lieu of a formal mandate in this case until October 8, 1982. This Court has proper jurisdiction under 28 United States Code §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The double jeopardy clause of the fifth Amendment to the United States Constitution provides that, "no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

This case comes from the United States District Court for the Eastern District of Pennsylvania, as per Criminal No. 80-00098. The Petitioner was charged with Distribution of Methamphetamine and Possession of a Firearm During the Commission of a Felony in Violation of 21 United States Code §841 and 18 United States Code §924 respectively.

The Petitioner was convicted of these charges following a trial by a jury before the Honorable Louis C. Bechtle, United States District Judge. In an Opinion filed March 16, 1981, *United States v. Curtis*, 644 F.2d. 263 (3rd Circuit, 1981) the United States Court of Appeals for the Third Circuit reversed the judgment of conviction because of an improper remark in the closing speech of the prosecutor.

At trial, the Petitioner stipulated the alleged drug transactions had taken place but testified that his involvement in those sales had been the result of entrapment by the Government's undercover operatives. In an apparent effort to discredit this defense, the prosecutor cross-examined the Petitioner as to why Mr. Curtis had

waited until his testimony at trial to offer this explanation of alleged entrapment. With regard to the Petitioner's conduct when initially taken into police custody, the prosecutor asked, "and then in this hour and one-half or two hours, you never said to those police officers, 'you got the wrong guy; I was forced into it'?"

Counsel for the Petitioner objected to the question, asserting a violation of the Fifth Amendment's privilege against self-incrimination. However, this objection was overruled, and the Petitioner answered by explaining that he failed to make such comments because he did not yet have a lawyer.

Prior to the closing arguments at trial, the trial Court cautioned the prosecutor against reminding the jury of the failure of the Petitioner to inform the arresting officers concerning the entrapment defense. The District Court specifically instructed the prosecutor to "avoid that in your argument; I don't think there's any legal basis for you to argue it on the facts of the case. . ."

However, during the Government's closing argument, the prosecutor stated to the jury as follows:

> "Well, ladies and gentlemen of the jury, you remember the direct examination of William Curtis and you remember the cross-examination of William Curtis, and there is just one question that was asked of Mr. Curtis.
>
> And by that, I ask the Court's leave to argue this, Your Honor.
>
> And that is, why didn't you tell this story to anyone before?"

Counsel for the Petitioner objected to this remark, and the Court immediately issued a curative instruction to the jury. The following day, counsel for the Peti-

tioner, citing "a chance to reflect on the events of yesterday," move for a mistrial. The prosecutor argued against the granting of a mistrial, arguing that his remarks constituted "an invited response" to alleged improper remarks in the summation of counsel for the Petitioner. The Motion for Mistrial was denied, with the District Judge then concluding that the utterance in question was ambiguous and that the instruction sufficiently cured any prejudice. The jury subsequently found the Petitioner guilty.

The Court of Appeals in the above-referenced Opinion held that the prosecutor's statements about the silence of the Petitioner, made in distinct and direct violation of the warning of the District Court, constituted an abridgement of the right against self-incrimination under the leading cases of this Court, *Doyle v. Ohio*, 426 U.S. 610 (1976), and *United States v. Hale*, 422 U.S. 171 (1975). In a footnote in that Opinion, the court of Appeals stated that the granting of a new trial would hopefully provide "effective deterrence against such misconduct" (Footnote 6). The Court concluded that the judgment of sentence would be reversed and the matter remanded for a new trial.

It should be noted that at this point, the Government did not pursue an Appeal to this Court from the decision of the Court of Appeals granting the new trial.

Before the case could be scheduled for retrial, however, the Petitioner filed a Motion to Bar Reprosecution by reason of the Double Jeopardy Clause. The District Court proceeded to conduct a hearing on the Motion and, at the conclusion thereof, granted the same and directed the dismissal of the indictment for violation of the Petitioner's rights under the double jeopardy clause. The Government moved to reconsider, but the same was denied, and the United States appealed the decision to the United States Court of Appeals for the Third Circuit.

It should be noted that at no time during the hearing before the District Court on the Motion to Bar Reprosecution did the government present any evidence, including any testimony from the Assistant United States Attorney who actually prosecuted the trial.

It should also be noted that in reaching this result, the District Court found as a fact that the prosecutor's remarks were made "in clear defiance" of the Judge's admonishment not to touch upon the subject of post-arrest silence. The District Court further concluded as a matter of fact that the Government's conduct "can be said to be intentional to invoke a request for a mistrial . . ."

On appeal, the United States Court of Appeals for the Third Circuit once again reversed Judge Bechtle, this time acting in line with the government's position. In its Opinion filed July 13, 1982, the District Court noted the Government's contention that such double jeopardy arguments should not be entertained where the prior conviction was reversed by an appellate tribunal on a ground other than insufficiency of the evidence. However, the Court of Appeals disposed of the appeal without deciding that question; rather, the Court of Appeals held that the findings of the District Court as above noted were "clearly erroneous" and that the record did not support a conclusion that the prosecutor's conduct could be said to have been intentionally designed to invoke a mistrial request by the accused.

The last paragraph of the Opinion (page 19) states the following as a summary of the holding of the Court of Appeals:

> "We conclude, therefore, that the District Court erred in finding that the prosecutor intended to cause a mistrial. The rationale offered by the District Court—that the misconduct was so blatant that the prosecutor must have known it would lead

> to a mistrial—must be set aside as clearly erroneous. After reviewing the record, we can discover no other evidence to support the Court's finding as to the prosecutor's intent. Accordingly, we hold that even if, under the double jeopardy clause, a retrial is ever barred following an appellate reversal for prosecutorial misconduct—a question we do not decide here—the misconduct in this case was not of the sort that would give rise to double jeopardy."

Upon this Opinion, the Petitioner moved for reargument en banc before the Court of Appeals, contending that the panel opinion improperly rejected valid findings of fact by the District Court and erred in applying the clearly erroneous standard to the review of those findings. However, the Court of Appeals denied the Petition for Reargument without an Opinion.

The Court of Appeals did extend the stay of the issuance of the mandate in this case until October 8, 1982, for the purpose of the filing of the instant Petition for a Writ of Certiorari before this Honorable Court.

REASONS FOR GRANTING THE WRIT

This Court should direct that the decision of the United States District Court in this matter be reinstated to the extent that that Court ordered that the Government would be barred from reprosecuting your Petitioner because of the intentional prosecutorial misconduct which occurred at his first trial and which caused the United States Court of Appeals for the Third Circuit to initially reverse the judgment of conviction and sentence.

This Court has stated that appellate reversal of a conviction on grounds other than insufficiency of the evidence would normally work no bar to reprosecution. *Burks v. United States*, 437 U.S. 1 (1978) and related cases. However, the Petitioner contends that an exception must exist with respect to this doctrine for circumstances such as this where the District Court has found that the Government's misconduct was designed to invoke a mistrial request by the Defendant.

In the Opinion below attached hereto as Exhibit "A", the United States Court of Appeals for the Third Circuit held that there is "considerable force" to your Petitioner's contention that the concerns underlying application of the Double Jeopardy Clause to mistrials would apply with equal weight to appellate reversals that result from prosecutorial conduct committed with the intention to provoke a mistrial request (Opinion, page 11). In proceeding to analyze this issue, the Opinion below stated that the distinctions raised in subsequent decisions of this Court, such as *Florida v. Tibbs*, 50 U.S.L.W. 4607 (1982), involved points that are not covered by matters such as the instant case, and that "a retrial in this setting involves problems that are not addressed by the Supreme Court's general statements restricting application of the Double Jeopardy Clause after appellate reversals. In view of these special concerns, it

may be argued that, despite the apparently preclusive language of *Burks* and subsequent cases, the Double Jeopardy Clause should not be read to forbid a retrial following an appellate reversal for prosecutorial misconduct if a retrial would be barred following the granting of a mistrial for the same conduct." Opinion, page 14. See *Dinitz v. United States*, 424 U.S. 600 (1976).

However, in resolving the issue before it, as was noted in the history of the case, the Court of Appeals elected not to decide this question, but rather to determine that the lower Court did not have a sufficient factual predicate upon which to rule that the prosecutor's conduct at the trial was in fact designed to invoke a mistrial request.

This result on the part of the Court of Appeals for the Third Circuit, your Petitioner submits, was in violation of the responsibility of an appellate Court to accept these factual determinations of the factfinder, unless those findings are so devoid of evidentiary support as to bear no rational relationship to the supporting factual data. *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3rd Cir. 1972). As Mr. Justice Blackmun stated in *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 758 (1975), in an Opinion reviewing findings of the District Court under the clearly erroneous rule, it is not the place of an appellate tribunal "to reappraise the evidence" unless the same "plainly fails to support the findings of the trier of fact". Mr. Justice Blackmun noted that an appellate tribunal has no function in "second guessing" such factual findings. And in *Oregon v. Kennedy*, 31 Cr. L.R. 3044, Footnote 7, the Opinion of Justice Rehnquist stated that appellate Courts traditionally give weight to the assessment of a trial Court as to findings of fact that are made in the Double Jeopardy Context, citing *Gori v. United States*, 367 U.S. 364 (1961), especially since it is the trial Judge who is "best situated intelligently to make

such decisions," as those Judges are "on the scene" in this regard.

Nevertheless, your Petitioner contends that what occurred in the instant case on the part of the United States Court of Appeals was in fact an improper reassessment of the evidence in the lower Court in order to avoid the unpleasant duty of facing up to the Double Jeopardy issue as raised by your Petitioner. There is no question but that a review of the record will establish that the findings of Judge Bechtle contained more than a minimum of evidentiary support and bore a rational relationship to the facts before him. For example, the District Court's finding that the prosecutor's act of going to the extreme of ignoring the trial Judge's express directive to refrain from commenting on this area and, boldly and defiantly looking the trial Judge in the eye, turning to the jury and speaking of an impermissible and unconstitutional inference of guilt from the Petitioner's post-arrest silence was surely a proper basis from which to conclude what intent the prosecutor possessed. As the District Judge stated, "any attorney who would sit in this Courtroom and represent any Defendant, no matter how unskilled, would rise just by reason of that kind of a defiance of the Court's Order and move for a mistrial. Mr. Moser (trial counsel) did it skillfully and well and promptly. Any lawyer would have done that who understands English. And that was clearly intended to provoke that mistrial request."

An additional example of the Court of Appeals' improper reassessment of the evidence from the Double Jeopardy hearing is seen in the conclusion therein that the action of the prosecutor in defending against the Motion for a mistrial by counsel for the Petitioner supports an inference (drawn by the Court of Appeals) that the prosecutor did not in fact intend to see a mistrial caused by his conduct. This conclusion by the Court of

Appeals creates a fallacy by contending that a prosecutor could prevent a bar to reprosecution (and thereby obtain another chance to try the Defendant) and yet continue with a tainted and prejudiced jury trial. Your Petitioner contends that there would never be a situation where a prosecutor concedes to the trial Judge that he in fact intended to cause the Defendant to move for a mistrial; rather, the prosecutor will always resist the granting of a mistrial, for were he to do otherwise, the admission of his true state of mind would destroy any opportunity to retry the accused pursuant to *United States v. Dinitz, supra*. Although the prosecutor in this case may have wanted a mistrial to occur, he surely did not wish to say anything which would result in a bar to retrial, as the same was doubtless his goal.

This Court should therefore reject the attempt by the Court of Appeals for the Third Circuit to substitute its judgment as to the weight of the inferences from the evidence for that of the District Court, and should either remand this matter back to the Court of Appeals to deal with the merits of the contentions raised herein concerning the Double Jeopardy Clause, or, in the alternative, should directly decide the Double Jeopardy issues pending in this litigation.

In the latter course, this Court has no alternative but to reinstate the Order of the District Court barring reprosecution. The willful misconduct which was found to have occurred in this case constitutes a far more serious defect in the proceedings than the type of routine trial errors which may cause convictions to be reversed on direct appeal. This Court should reject any attempt by the Government to distinguish among Defendants who successfully gain a mistrial and those who are compelled to obtain appellate redress because of an erroneous ruling by a trial judge that a mistrial should not be granted where there was intentional prosecutorial misconduct.

In *United States v. Rios*, 637 F.2d 728 (10th Cir. 1980), *certiorari denied* 101 S. Ct. 3054, the Tenth Circuit refused to accept the distinction between the granting of a new trial at the urging of a Defendant and ordering a mistrial at his request under a Double Jeopardy analysis. That Court concluded that reversal of a conviction for prosecutorial misconduct after a mistrial has been denied should be treated the same way for purposes of Double Jeopardy claims as if the mistrial had been granted in the first instance. In accord, see *Commonwealth v. Potter*, 386 A.2d 918 (Pa. 1978); see also *United States v. Roberts*, 640 F.2d 225 (9th Cir. 1981); *United States v. Opager*, 616 F.2d. 231 (5th Cir. 1980); *United States v. Heymann*, 586 F.2d. 1039 (5th Cir. 1978) at 1040.

In the instant case, there was an actual Court directive to a prosecutor to refrain from commenting upon an area upon which the Court had previously ruled as being improper and violative of the Constitutional rights of the Defendant. This was only stated by the prosecutor because of his fear that the Petitioner's entrapment testimony might be accepted by the jury as a credible basis for a verdict of acquittal. The failure of the Government to call the prosecutor as a witness at the hearing before the District Court supports an adverse inference against the Government for the absence of an explanation in this regard.

Pursuant to this Court's decision in *Oregon v. Kennedy, supra*, the finding of the District Court that the prosecutor's actions were intended to provoke a mistrial request to thereby subject the Petitioner to the substantial burdens imposed by a multiple prosecution in this matter should bar a retrial. This conclusion must stand even though the trial judge did not initially grant a mistrial, but only recognized the extent of the impropriety after the United States Court of Appeals for the Third Circuit reversed the judgment of conviction and re-

manded for a new trial. Accordingly, your Petitioner respectfully contends that the action of the District Court in granting the Motion to Bar Reprosecution by reason of the Double Jeopardy Clause was proper and that the action of the United States Court of Appeals for the Third Circuit in vacating that Order should be reversed.

CONCLUSION

The Petitioner respectfully submits that the Double Jeopardy Clause of the United States Constitution was violated by the circumstances of the trial in this case wherein the prosecutor was found to have intentionally taken steps designed to cause the Defendant to move for a mistrial, which he did. While the trial judge did not initially recognize the merits of the motion for a mistrial, the corrective action of the Court of Appeals in the initial Appeal from the Judgment of Conviction enlightened him as to the true circumstances of the matter and, in response to your Petitioner's Motion to Bar Reprosecution, the District Court properly found that the prosecutor intended to cause the Petitioner to move for a mistrial and therefore reprosecution would be barred pursuant to *Oregon v. Kennedy, supra.* The action of the Court of Appeals in vacating that Order under the clearly erroneous rule was entirely inappropriate and constituted a further violation of your Petitioner's rights to due process of law and to be free from multiple prosecutions. Therefore, your Petitioner respectfully submits that this Honorable Court should vacate the Order of the United States Court of Appeals for the Third Circuit and reinstate the Order of the United States District Court for the Eastern District of Pennsylvania directing that the Government be barred from reprosecution in this case.

Respectfully submitted,

By: /s/ Donald M. Moser
DONALD M. MOSER

By: /s/ Burton A. Rose
BURTON A. ROSE
Attorneys for Petitioner

CERTIFICATE OF SERVICE

DONALD M. MOSER, Esquire, and BURTON A. ROSE, Esquire, being duly sworn according to law, depose and say that a true and correct copy of the within Petition for a Writ of Certiorari has been duly served upon the Solicitor General of the United States, Department of Justice, Washington, D.C.

By: /s/ Donald M. Moser
DONALD M. MOSER

By: /s/ Burton A. Rose
BURTON A. ROSE
Attorneys for Petitioner

Dated: October 5, 1982